IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| JOHN WILSON, et al. | : | CIVIL ACTION |
| | : | |
| v. | : | |
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| MVM, INC., et al. | : | NO. 03-4514 |

MEMORANDUM

Bartle, J. May 24, 2005

Plaintiffs John Wilson, Frank Kryjer, and Donald Jones, challenge their discharge as federal Court Security Officers ("CSO's") for failure to meet medical standards established and implemented by the United States Marshals Service ("USMS") and endorsed by the Judicial Conference of the United States ("Judicial Conference").[1]

Before the court is the motion of their employer, MVM, Inc. ("MVM"), for summary judgment. The USMS, the Judicial Conference and the United States Department of Justice (collectively, the "federal defendants") also move for summary judgment. Finally, the plaintiffs seek summary judgment against the federal defendants and have recently filed a motion for "relief from judgment," which is in effect a motion for partial reconsideration of an Order the court entered on April 1, 2004.

1. None of the parties discusses the nature of any liability on the part of the U.S. Department of Justice or the Judicial Conference.

## I. Procedural History

Plaintiffs filed their complaint on August 5, 2003 alleging that their terminations violated: (1) their rights to equal protection, substantive due process, and procedural due process under the Fifth Amendment; (2) the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq.; (3) the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et seq.; (4) the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, et seq.; (5) the Pennsylvania Human Relations Act ("PHRA"), PA. STAT. ANN. tit. 43, § 951, et seq.; and (6) the common law of contracts. On April 1, 2004, we granted the motion of the federal defendants to dismiss the complaint against them for lack of subject matter jurisdiction and for failure to state a claim. We determined, among other things, that the plaintiffs were employees of defendant MVM and not federal employees, and therefore, could not maintain employment-dependent causes of action against the federal defendants. Wilson v. MVM, Inc., Civ.A. No. 03-4514, 2004 WL 765103, at *7-8 (E.D. Pa. Apr. 1, 2004). We also granted in part and denied in part the motion of MVM partially to dismiss the complaint, or in the alternative, for partial summary judgment. In particular, we dismissed those portions of the plaintiffs' ADEA claims to the extent that they were based upon a theory of disparate impact. Id. at *11.

Plaintiffs filed a timely motion for reconsideration. After oral argument, we granted their motion in part and denied it in part. We vacated our Order of April 1, 2004 to the extent

it dismissed the plaintiffs' procedural due process claims seeking injunctive and declaratory relief against the federal defendants. Thereafter, MVM moved for partial judgment on the pleadings and for partial summary judgment. We granted the motion for partial judgment on the pleadings as unopposed, and denied the motion for partial summary judgment on September 30, 2004. Currently, procedural due process claims for injunctive and declaratory relief under the Fifth Amendment remain against the federal defendants. Procedural due process claims for monetary, declaratory, and injunctive relief remain against MVM, as do the ADA, the ADEA, and the breach of contract claims. Finally, plaintiffs seek reconsideration of that part of our April 1, 2004 Order in which we dismissed their disparate impact claims under the ADEA.

## II. Standard of Review

Under Rule 56(c) of the Federal Rules of Civil Procedure, we may grant summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Id. at 254. We review all evidence and make all reasonable inferences from the evidence in the light most favorable to the non-movant. See

Wicker v. Consol. Rail Corp., 142 F.3d 690, 696 (3d Cir. 1998). The non-moving party may not rest upon mere allegations or denials but must set forth specific facts showing there is a genuine issue for trial. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888 (1990).

## III. Facts

The relevant facts are undisputed. In carrying out its statutory obligation "to provide for the security of the United States District Courts, the United States Courts of Appeals, and the Court of International Trade" under 28 U.S.C. § 566(a), the USMS contracts with private companies to supply CSO's at federal courthouses. Sometime in either 1997 or 1998, the Judicial Conference, working in conjunction with the USMS, arranged for the U.S. Public Health Service to develop uniform medical standards and procedures for the CSO position. After a review of the final report in February, 2000, the Judicial Conference and the USMS endorsed the findings, and the USMS implemented the changes beginning in June, 2002.

In the early part of 2001, United International Investigative Services ("UIIS"), a predecessor of MVM, supplied CSO's, including the plaintiffs, to work at the federal courthouse in Philadelphia pursuant to a contract with the USMS (the "Third Circuit Contract"). The Third Circuit Contract declares that "[o]ne of the major responsibilties of the USMS is to ensure the safety of all federal courts and court employees against unauthorized, illegal, and potentially life-threatening

activities." Third Circuit Contract § C-1(a). According to its terms, MVM is to "provide qualified CSO's" for "the complete safety and security of judges, court personnel, jurors, witnesses, defendants, federal property and the public." Id. at § C-5(d)(1). "Any employee provided by the Contractor that fails to meet the requirements of the [Third Circuit] Contract, including, but not limited to, the ... medical ... standards, ... may be removed from performing services for the [USMS under the Third Circuit Contract]." Id. at § H-3(a). "The United States Marshals Service reserves the right at all times to determine the suitability of any Contractor employee to serve as CSO." Id. at § H-3(b).

Under the Third Circuit Contract, before CSO's may be assigned to a federal courthouse, and once assigned annually thereafter, they must undergo a medical examination to ensure that they are "able to withstand physical demands of the job and [are] capable of responding to emergency situations." Third Circuit Contract, § C-6(2). The Third Circuit Contract further states:

> C-8 MEDICAL STANDARDS AND PROCEDURES
> (a) The medical condition of the CSO workforce is critical to the overall safety of the judiciary. To ensure that each CSO is medically qualified to perform in a CSO capacity, all prospective contract CSO employees shall undergo and pass the required USMS pre-employment medical examination. In addition, all contract CSO employees must undergo and pass an annual reexamination during the life of the contract....

(b) The Contractor shall establish and maintain designated licensed physicians to perform and document such medical examination on all CSO employees on behalf of their company....

(d) Medical examination findings shall be submitted within the established time frame (required with each personnel application or by December 31 of each subsequent year) to Judicial Protective Services for final review and approval....

(e) Each applicant must meet the health certification requirements listed in the USM-229, Certificate of Medical Examination for Court Security Officers form, Attachment 2F, and the medical standards outlined below. No CSO employee shall be allowed to perform services under the CSO program until this certificate has been submitted to and approved by the Judicial Protective Services Program. Failure to meet any one of the required medical and/or physical qualifications will disqualify any employee for appointment or continuation under the contract. If a CSO fails to meet the medical and/or physical standards upon reexamination, the CSO shall be relieved of duties until the problem is corrected or the employee is officially removed from the CSO Program. If relieved for medical reasons, the Government shall not be liable to pay for hours unworked during illness. Contractor employees found to have a correctable condition may be eligible for reappointment when the disqualifying condition is satisfactorily corrected or eliminated. The Contractor shall ensure that CSO employees comply with the USMS Medical Officer's request for follow-up or clarifying information regarding treatment measures. All requests from the USMS Medical Officer for additional information must be responded to within thirty days from the date of the request, unless a specific written extension is authorized by Judicial Protective Services. Failure to provide the requested information to the USMS Medical Officer could result in a determination of medical disqualification.

Third Circuit Contract, § C-8(a),(b),(d) and (e).

The Third Circuit Contract proceeds to list certain medical standards, virtually all of which "should" be met or "may be disqualifying." The line between qualification and disqualification was not and could not always be stated with exactness. For example, under Cardiovascular System, the contract provides, "[a]ny condition which significantly interferes with heart function may be disqualifying." Third Circuit Contract, § C-8(e)(3). The Third Circuit Contract list of medical standards also contained the following: "[t]hough not mentioned specifically above, any other disease or condition which interferes with the full performance of position duties may be disqualifying." Third Circuit Contract, § C-8(e)(12). Finally, "the Government reserves the right to incorporate revised medical qualifications at a later date." Third Circuit Contract, § C-8(f).

Physicians designated by MVM, rather than the personal physicians of the CSO's, are required to conduct all medical examinations after June, 2002. The results of the examinations are sent to a physician who conducts a review on behalf of the USMS's Judicial Security Division. The physician reviews the examination results and determines whether a person meets the health certification requirements listed in the Third Circuit Contract for a CSO position. A person will be disqualified as a CSO under the Third Circuit Contract if he or she fails to meet

any of the health qualifications. Before disqualifiction, the USMS may seek additional medical information.

There is also a collective bargaining agreement ("CBA") between UIIS and the plaintiffs' labor union, International Union, United Government Security Officers of America, which governs certain terms of the plaintiffs' employment. MVM, as plaintiffs' current employer, concedes that it is bound to the CBA as successor to UIIS. The CBA provides:

> Suspension or discharge shall be for just cause only. Any grievance relating to the suspension, layoff or discharge of an employee whose job classification is covered by this Agreement must be served in writing on the Contract Manager within ten (10) working days of the date upon which the suspension, layoff or discharge was effective, or the grievance shall be null and void.

Collective Bargaining Agreement, Art. 10, § C, Step 1, ¶ 1. It further provides for an "Informal Procedure" for resolving grievances, to be followed by up to three additional formal "Steps" and then arbitration. Id. at Art. 10, § C.

A. Plaintiff John Wilson

On May 7, 2001, a physician designated by UIIS examined plaintiff John Wilson as required under the Third Circuit Contract. Wilson received a Medical Review Form dated June 27, 2001 from the Judicial Security Division of the USMS noting that he had hearing loss in both ears, suffered from diabetes, and had an abnormal electrocardiogram. Dr. Richard Miller, the reviewing physician on behalf of the USMS, requested additional medical

reports from Wilson's treating physician with respect to his diabetes and his abnormal electrocardiogram. Pending review of the additional medical reports, Dr. Miller determined that Wilson was "[n]ot medically qualified to perform the essential functions of the job." Wilson submitted the requested medical information on September 20, 2001.

On October 1, 2001, MVM replaced UIIS as the private security company providing CSO's under the Third Circuit Contract, and Wilson and the other plaintiffs became employees of MVM. Despite Dr. Miller's initial conclusion, Wilson continued to work as a CSO.

On February 7, 2002, Wilson had his annual medical examination conducted by physicians designated by MVM. On a Medical Review Form dated March 12, 2002, Dr. J. V. Barson, another USMS reviewing physician, made his findings upon review of Wilson's September, 2001 supplemental medical reports. He made no reference to Wilson's more recent February 7, 2002 medical examination. Dr. Barson explained that according to the documentation provided as of September, 2001:

> [Y]our diabetes is not well controlled with elevated blood sugars and hemoglobin A1C levels .... Uncontrolled diabetes can result in visual disturbances, cognitive disorders, and long-term medical complications. In addition, the conditions of work (unpredictable levels of physical and psychological stress, variable work schedule, and unplanned mealtimes with possibly skipped meals) may predispose you to the development of hypoglycemia, which impairs cognitive functioning (attention, concentration, level of consciousness). The conditions of work

> can also adversely impact your ability to maintain the tight diabetic control that is needed to reduce the risk of long-term complications.
>
> Additionally, your cardiac stress tests have shown what appears to have [sic] a pattern of cardiac deterioration ....
>
> The combination of these medical conditions increases the risk of incapacitation in an emergency and poses a significant risk to the health and safety of yourself and others in the performance of these essential functions of the job.

He therefore recommended that Wilson be medically disqualified. Wilson was not furnished with Dr. Barson's conclusions at that time.

On April 18, 2002, Dr. Barson completed another Medical Review Form. This one referenced the results of Wilson's annual medical examination of February 7, 2002. Dr. Barson quoted the language of the previous Medical Review From dated March 12, 2002 and noted that "[t]here is no new information in the FY 2002 Examination that would change the medical determination rendered from the FY 2001 Examination." Again, a copy of his conclusions was not sent to Wilson.

By letter dated April 26, 2002, Marc Farmer, Chief of Judicial Protective Services, notified Steve Gottrich, Senior Operations Coordinator of MVM, that Wilson did not meet the USMS's medical standards and was therefore medically disqualified. He requested that Gottrich "submit a replacement package within fourteen business days." The Chief Financial Officer of MVM, Joseph Morway, received a follow-up letter dated

April 29, 2002 from Deborah Skeldon, Contracting Officer of the USMS. She reminded Morway that "the duties of a CSO require a greater level of physical and medical fitness than do those of the average sedentary worker." She then requested that Wilson be removed "immediately from performance under this contract."

On or about May 2, 2002, MVM notified Wilson that his employment was terminated as a result of his medical disqualification by the USMS. He was 61 years old. While MVM believed that he was qualified to continue working, it had no other employment positions available within the Eastern District of Pennsylvania.[2] It was not until this time that Wilson was presented with a copy of the April 18, 2002 Medical Review Form and of Skeldon's April 29, 2002 letter to Morway.

On May 9, 2002, after he had been terminated, Wilson wrote a letter to Skeldon contesting the determination that he was not medically qualified to perform as a CSO. He attached additional lab reports from his personal physician concerning his diabetes. When Skeldon received Wilson's letter she "discussed it with legal counsel" and "put it in the file." Skeldon Dep. Jan. 28, 2005, at pp. 40-41. She did not respond to Wilson, nor did she forward his letter to Farmer, the Chief of Judicial Protective Services.

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2. The Eastern District of Pennsylvania comprises the following nine counties: Berks, Bucks, Chester, Delaware, Lancaster, Lehigh, Montgomery, Northampton, and Philadelphia.

On May 10, 2002, Wilson's union filed a grievance with MVM regarding his termination. MVM denied Wilson's grievance at the Informal Step and then again at Step 1. Neither Wilson nor his union pursued the grievance through the remaining steps or arbitration allowed under the CBA.

B. Plaintiff Frank Kryjer

Plaintiff Frank Kryjer was examined on April 26, 2001 by a physician designated by UIIS. Thereafter, Kryjer received his Medical Review Form dated June 18, 2001 from Dr. Miller, the USMS reviewing physician. His electrocardiogram was "abnormal," and his audiogram revealed hearing loss. Dr. Miller requested that Kryjer submit additional medical information from his personal physicians and described his status as "[m]edical determination deferred pending further documentation." On July 23, 2001, Kryjer forwarded the requested medical information. Kryjer remained on the job after MVM replaced UIIS on October 1, 2001.

Kryjer underwent his next annual examination on January 24, 2002 by an MVM designated physician. He was found to suffer from "moderate conversational hearing loss in the right ear ... and a bilateral high frequency hearing loss." On February 7, 2002, Dr. Barson, the USMS reviewing physician, issued a Medical Review Form referencing Kryjer's medical examination of April 26, 2001 and the supplemental medical information Kryjer had provided in July, 2001. There was no mention of the recent January 24, 2002 examination. Upon review

of the additional hearing and cardiology information received through July, 2001, Dr. Barson wrote: "[t]he Functional Hearing Tests reveal significant hearing impairment. Although you do meet the hearing standard with hearing aids in place, your testing results show that you do not meet the hearing standard unaided." He continued: "hearing aids are not [an] acceptable means of meeting the hearing standards for law enforcement positions because they do not restore normal hearing .... In addition, hearing aids are mechanical devices and are subject to failure, malfunction, dislodgement in physical confrontations, and battery replacement needs." He determined that "there would be a significant risk of harm to the health and safety of [Kryjer] and others if [he] were to perform the essential functions of the job with the use of a hearing aid," and he recommended medical disqualification. The record does not establish whether Kryjer ever received this Medical Review Form.

Dr. L. Chelton, another USMS physician, issued a Medical Review Form dated March 28, 2002, which set forth his findings with respect to Kryjer's January, 24, 2002 medical examination. Kryjer was not given a copy of the Medical Review Form at this time. Dr. Chelton noted that Kryjer had surgery for lung cancer and a history of asthma. He also commented that Kryjer had been medically disqualified on December 3, 2000 due to hearing loss.[3] While Dr. Chelton asked for additional medical

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3. Kryjer contests that he ever had asthma and states that he (continued...)

information from Kryjer, he listed his status as "[n]ot medically qualified to perform the essential functions of the job."

On April 29, 2002, Farmer, Chief of Judicial Protective Services, notified Gottrich, Senior Operations Coordinator of MVM, that Kryjer was medically disqualified to remain as a CSO and he requested "a replacement package." That same day, Skeldon, Contracting Officer for the USMS, wrote Morway, Chief Financial Officer of MVM, asking him to remove Kryjer from "performance under this contract."

On May 6, 2002, MVM notified Kryjer, then 56 years old, that as a result of his medical disqualification by the USMS, his employment was terminated. At this time, he was presented with a copy of the Medical Review Form of March 28, 2002. Despite his hearing loss, MVM believed that he was qualified to continue working, but MVM had no other job available for him within the Eastern District of Pennsylvania.

Kryjer's union filed a grievance with MVM regarding his termination on May 9, 2002. MVM denied his grievance at the Informal Step and at Step 1. Neither Kryjer nor his union took the grievance through the additional steps under the CBA. On May 18, 2002, Kryjer wrote a letter to Gottrich appealing his termination. Gottrich responded by letter dated May 21, 2002, informing Kryjer that "there is nothing that MVM, Inc. can do to

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3.(...continued)
was never given a physical in December, 2000.

help you in this regard" and that "the USMS made the decision to have you removed from the CSO program."

C. Plaintiff Donald Jones

On April 12, 2001, plaintiff Donald Jones was examined by a physician designated by UIIS. He received a Medical Review Form dated June 12, 2001 from the USMS reviewing physician, Dr. Miller, which stated that he had significant hearing loss and cardiac arrhythmia. It also recorded that the USMS had discovered these conditions during his September 10, 2000 medical examination and that follow-up information had been requested but not received. His status was listed as "[n]ot medically qualified," but Dr. Miller requested additional medical information for review. Jones provided the requested information on or about August 20, 2001. He remained on the job after October 1, 2001 after MVM's replacement of UIIS.

On January 16, 2002, Jones underwent his annual medical examination by an MVM designated physician. On February 8, 2002, Dr. Barson, the USMS reviewing physician, issued a Medical Review Form which included his review of the medical information Jones had submitted in August, 2001 but did not reference his more recent January 16, 2002 medical examination. Dr. Barson wrote that Jones suffered from "significant hearing loss in the conversational range," including a "decreased ability to hear soft sounds and to distinguish speech, especially in background noise." He added that Jones' "impairment in performing these essential law enforcement function [sic] poses a significant risk

to the health and safety of yourself, other law enforcement officers, and the public." He recommended medical disqualification.

It was not until March 15, 2002, that Dr. Barson issued a Medical Review Form regarding Jones' 2002 annual medical examination. He commented that Jones had already been disqualified on February 8, 2002 based upon his 2001 annual medical examination and a review of the supplemental medical information Jones had provided.

On May 8, 2002, Farmer, Chief of Judicial Protective Services, wrote a letter to Gottrich, Senior Operations Coordinator of MVM, informing him of Jones' medical disqualification and requesting a "replacement package." By letter dated May 10, 2002, Skeldon, Contracting Officer of the USMS, notified Morway, Chief Financial Officer of MVM, that Jones was disqualified and requested a "replacement package."

MVM terminated Jones' employment on May 11, 2002. He was 66 years old. As with the other plaintiffs, MVM discharged Jones despite its view that he was qualified to continue as a CSO. MVM did so because the USMS had determined that he was medically disqualified and because MVM had no other jobs available within the Eastern District of Pennsylvania. Neither Jones nor his union filed a grievance with MVM under the CBA regarding his termination.

## IV. Fifth Amendment Procedural Due Process Claims Against the Federal Defendants

The plaintiffs contend that the USMS deprived them of procedural due process with regard to the loss of their jobs as CSO's. Procedural due process imposes constraints on governmental decisions that deprive individuals of certain types of liberty or property interests. See Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569-70 (1972). When the federal government seeks to deprive an individual of a liberty or property interest within the meaning of the Fifth Amendment's Due Process Clause, the individual must be afforded notice of the charges and the evidence against him or her and an opportunity to be heard. Cleveland Board of Educ. v. Loudermill, 470 U.S. 532, 542, 546 (1985). However, a full evidentiary hearing is not always required. Id. at 545. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Gilbert v. Homar, 520 U.S. 924, 930 (1997) (citation omitted). The point in time when a person is given the opportunity to be heard may also be critical in determining whether procedural due process has been satisfied. Depending on the circumstances, the Constitution may require that an employee be given the right to be heard before, rather than after, he or she is deprived of a liberty or property interest. See Gilbert, 520 U.S. at 924.

The plaintiffs assert that they have protected property interests in their employment with MVM. "Property interests, of

course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Board of Regents, 408 U.S. at 577. The CBA which covers each plaintiff provides that "[s]uspension or discharge shall be for just cause only." Collective Bargaining Agreement, Art. 10, § C, Step 1, ¶ 1. As we have previously explained in a similar case:

> The general rule in Pennsylvania is that an employee does not have a legitimate expectation of entitlement in his employment. See Dibonaventura v. Consol. Rail Corp., 539 A.2d 865, 867 (Pa. Super. Ct. 1988). Pennsylvania law presumes that all employment is at-will, unless the employee can "show from the circumstances surrounding the undertaking of employment that the parties did not intend the employment to be at-will." Id. However, "[g]overnment employees who are entitled to retain their positions unless dismissed for cause have a property interest protected by due process considerations." Veit v. North Wales Borough, 800 A.2d 391, 398 (Pa. Commw. Ct. 2002); see also Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538-39 (1985).

Leitch v. MVM, Inc., Civ.A. No. 03-4344, 2005 WL 331707, at *3 (E.D. Pa. Feb. 10, 2005).

Under the CBA between the union and MVM, plaintiffs, as noted above, could only be terminated by MVM for just cause. They were not employees at will. For present purposes, we will assume that they had a protected property interest in their jobs with MVM. Although we have previously held that plaintiffs were

not employees of the government, Wilson, 2004 WL 765103, at *7-8, there is authority for the proposition that government interference with a person's property or liberty interest in private employment calls into play procedural due process. Greene v. McElroy, 360 U.S. 474 (1959); Merritt v. Mackey, 827 F.2d 1368 (9th Cir. 1987); Stein v. Bd. of City of New York, 792 F.2d 13 (2d Cir. 1986).

While the plaintiffs allege that they were deprived of a property interest in their employment, they do not assert the deprivation of any liberty interest. In contrast to a property interest, a liberty interest is implicated when a plaintiff shows "a stigma to his reputation plus some concomitant infringement of a protected right or interest." Graham v. City of Philadelphia, 402 F.3d 139, 142 n.2 (3d Cir. 2005) (citation omitted); see also Paul v. Davis, 424 U.S. 693, 701, 709 (1976).

Under the Third Circuit Contract between the USMS and MVM, the USMS could prevent plaintiffs from being assigned to work as CSO's whenever the USMS found them to be medically disqualified. There is evidence in the record that MVM had no other positions available for plaintiffs at the time it discharged them. According to plaintiffs, the word from the USMS that a CSO was not medically qualified was tantamount to the CSO's loss of his job with MVM.

Plaintiffs rely first on the Supreme Court decision in Greene, supra. There the plaintiff, an aeronautical engineer, was employed by a private manufacturer which provided certain

mechanical and electronic products to the armed services. The Department of Defense denied the plaintiff's security clearance and requested that his employer exclude the plaintiff from any part of its factories in which classified projects were being carried out. While various administrative hearings were held at which plaintiff testified, he was never told who the government informants were and was never provided with their statements. Indeed, those sitting on the various boards to decide his fate never even saw the informants. According to the employer, it had no work that the plaintiff could perform in light of the denial of his security clearance. As a result it fired him.

The Supreme Court recognized that the denial of a security clearance would deprive the plaintiff of the opportunity to obtain work in his profession as an aeronautical engineer. It disapproved of the government's denial of the plaintiff's security clearance on the basis of information from confidential individuals whom the plaintiff had no opportunity to confront. The Court declared that "the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment." Id. at 493 (citations omitted). In a footnote, the Court also noted: "petitioner has the right to be free from unauthorized actions of government officials which substantially impair his property interests." Id. at 493 n.22. The Court ruled that the Department of Defense had no Presidential or Congressional

authority "to deprive [him] of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." Id. at 508. It then reversed and remanded for further proceedings.

Several years after Greene, the Supreme Court decided Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO, v. McElroy, 367 U.S. 886 (1961). The plaintiff was a cook at a cafeteria operated by her private employer, M & M Restaurants, Inc. The cafeteria was on the premises of the Naval Gun Factory, a military installation. Without affording her notice or any type of hearing, naval officials determined that the plaintiff failed to meet security requirements and forbade her from entering the Naval Gun Factory after that time. Her employer offered her a position in another restaurant, but she refused on the ground that the location was inconvenient.

The Supreme Court affirmed the grant of summary judgment in the defendants' favor. It held that the plaintiff was not entitled to the protections of procedural due process. Id. at 898. The Court reasoned that, unlike Greene, the Navy regulations in effect at the time that plaintiff's security clearance was revoked specifically conferred upon the naval officials the power summarily to deny her access to the Naval Gun Factory. Id. at 890-94. These regulations had been expressly approved by the President. Id. at 891. What also distinguished Greene was the fact that in Cafeteria Workers the plaintiff's affected private interest "was not the right to follow a chosen

trade or profession ... [since the plaintiff] remained entirely free to obtain employment as a short-order cook or to get any other job, either with [her current employer] or with any other employer." Id. at 895-96. Moreover, while it was recognized in Greene that the government's interference may have attached some stigma to plaintiff, 360 U.S. at 492 n.21, "a badge of disloyalty or infamy" was not bestowed upon the plaintiff in Cafeteria Workers. 367 U.S. at 898.

Thus, a liberty interest protected by due process was implicated in Greene but not in Cafeteria Workers. Lastly, the Court in Cafeteria Workers seemed to be persuaded by the fact that the government function involved was that of "manag[ing] the internal operation of an important federal military establishment." Id. at 896.

In addition to Greene, plaintiffs cite to Merritt, supra, and Stein, supra, to support their position that the USMS interfered with their property interests in their jobs without affording them procedural due process. In Merritt, the plaintiff was employed as a counselor by a private non-profit corporation which had a contract with both a federal and a state agency. His employer fired him after state and federal officials directed it to do so. He was never given notice of the reasons or an opportunity to respond. On appeal from a grant of summary judgment in the officials' favor, the Court of Appeals for the Ninth Circuit affirmed in part and reversed in part. It ruled that the plaintiff stated a claim under 42 U.S.C. § 1983 that the

officials deprived him of his property interest in continued employment and remanded for a trial. Merritt, 827 F.2d at 1372.

In Stein, the plaintiff was a school bus driver employed by a private transportation company whose sole business was the provision of bus transportation for disabled children for the New York City Board of Education. The district court determined, and the Court of Appeals for the Second Circuit agreed, that he possessed a protected property interest in his employment. After it was alleged that he had exposed himself while driving one of the buses, the Board of Education barred him from driving on their routes because he fell below the standards of good moral conduct. His employer subsequently fired him without proper notice of the nature of the accusations. Although the Court of Appeals spoke in terms of a property interest, its decision also referenced Stein's liberty interest. The court was persuaded that Stein's disqualification not only meant that he could no longer work for his employer but that his character was called into question, "thereby tainting his chance of obtaining other employment involving the transportation of students." Id.

In contrast to Stein and Greene, the plaintiffs here do not allege that any liberty interest has been affected due to their medical disqualification and the loss of their jobs with MVM. They do not argue that they have been so stigmatized that they could not find other work as security guards. In contrast to Merritt, the USMS did not demand or even suggest that MVM fire plaintiffs. The USMS simply advised MVM that the plaintiffs

could not work as CSO's at the various federal courthouses due to health and safety concerns. To the extent it is relevant, there is no evidence before us that the USMS knew that MVM had no other work for plaintiffs when the Third Circuit Contract was signed or when MVM was advised of the deficient medical conditions of plaintiffs.

Under the undisputed facts here, it cannot be said that the USMS unreasonably interfered with the plaintiffs' employment with MVM. See Greene, 360 U.S. at 493. Nor has the USMS engaged in any "unauthorized actions ... which substantially impair[ed] [plaintiffs'] property interests" in their employment. Id. at 493 n.22. Again, the USMS did not demand that MVM fire the plaintiffs as in Merritt and clearly did not stigmatize plaintiffs so as to prevent then from obtaining jobs in their chosen field as in Greene or Stein. Analogous to Cafeteria Workers where no liberty interest was involved, the USMS took the limited action it did pursuant to the preexisting Third Circuit Contract and its statutory authority to protect the federal courthouse in Philadelphia as well as all the court employees, jurors, litigants, lawyers, witnesses, judges, and members of the public who might be present there. See 28 U.S.C. § 566(a).

The deprivation of a protected property interest does not in itself violate procedural due process. Zinermon v. Burch, 494 U.S. 113, 125-26 (1990). Rather, it is the deprivation of such an interest without due process of law that is unconstitutional. Id. Assuming that the USMS's medical

disqualification of the plaintiffs did constitute a deprivation of their protected property interests, we turn to the question whether the USMS afforded plaintiffs procedural due process.

The USMS made initial determinations in April and May, 2001 that the plaintiffs were medically disqualified pending review of additional medical information. Wilson, Kryjer and Jones were asked to submit to the USMS supplemental medical information, which they did in September, July, and August, 2001, respectively. The Third Circuit Contract was renewed on October 1, 2001, and the plaintiffs continued in their positions in the meantime. Pending a final decision, the USMS allowed plaintiffs to continue to work at the courthouse as CSO's.

In 2002, the plaintiffs were subjected to another annual medical examination under the auspices of MVM without having received any word from the USMS regarding their pending status. In February, 2002 and March, 2002, five to six months after receiving each plaintiff's supplemental medical information, the USMS reviewing physicians issued disqualifying Medical Review Forms. In each of these Medical Review Forms, the physician stated that he had reviewed the medical information submitted by the plaintiff in connection with his 2001 examination. The decision of the USMS to disqualify each plaintiff was based upon review of his 2001 medical examination submitted by UIIS and the supplemental medical information each plaintiff provided in response to the initial Medical Review Form of the USMS. The medical decisions disqualifying the plaintiffs

were all based on information on hand prior to MVM's 2002 examinations.

It was not until one month after each plaintiff had already been found to be medically disqualified that the USMS physicians issued Medical Review Forms based upon the 2002 examinations. Wilson's and Jones' Medical Review Forms noted that they had already been medically disqualified based upon the 2001 examinations. Kryjer's Medical Review Form referenced that he had been medically disqualified as of a December, 2000 examination, and it made note of some additional medical problems. Kryjer disputes some of these medical findings and disputes ever having been subjected to a medical examination in December, 2000. Regardless of the accuracy of this March, 2002 Medical Review Form, however, he had already been medically disqualified as of February 7, 2002, based upon his 2001 examination.

Procedural due process, if applicable, first requires that the CSO be advised in reasonable detail of the basis on which he was found to be medically disqualified. See Loudermill, 532 U.S. at 546. This was done.

Procedural due process also demands that each CSO be afforded an opportunity to present his or her side of the story. Id. at 546. However, an evidentiary hearing is not always necessary. Id. at 545. As we have noted previously, "due process is flexible and calls for such procedural protections as the particular situation demands." Gilbert, 520 U.S. at 930

(citation omitted). Unlike Greene, Merritt, or Stein, where the credibility of witnesses was or would be critical, the USMS' decision concerning plaintiffs was based solely on medical records. It was sufficient, as was done here, to allow the plaintiffs to submit additional medical information to support their fitness for the job and to rebut the USMS's initial determination that they did not meet the medical standards. See Mathews v. Eldridge, 424 U.S. 319 (1976). They have cited no case that requires them to be given a second opportunity to present rebuttal evidence after the USMS made its final determination that they did not meet the necessary standards properly to safeguard the federal courthouse in Philadelphia.

As noted above, the time when a person is afforded an opportunity to be heard can be significant for due process purposes. We need not grapple with this issue because all three plaintiffs were provided the chance to submit supporting medical information prior to their being removed from their posts as CSO's. See Gilbert, 520 U.S. at 924.

Due process, in our view, does not demand anything beyond what occurred here. While we are sympathetic with the plaintiffs' plight, the Due Process Clause does not guarantee against "incorrect or ill-advised personnel decisions." Collins v. City of Harker Heights, 503 U.S. 115, 129 (1992). Nor does it include the right of plaintiffs to challenge or second guess the medical standards or decisions of the physicians acting on behalf of the USMS. See id. The Third Circuit Contract between the

USMS and MVM identifies some general health standards for CSO's. Those standards, as noted above, are for the most part couched, as they must be, in general language and simply identify what "may be disqualifying." The government also "reserves the right to incorporate revised medical qualifications at a later date." Due to the statutory responsibility of the USMS in safeguarding the federal courthouses, particularly in these perilous times, it must necessarily be given leeway in deciding on the qualifications of the CSO's who play such an important role in carrying out that responsibility.

Plaintiffs Kryjer and Jones point to that portion of the Third Circuit Contract which sets forth the hearing standards. These criteria are more specific than most of the other listed standards. The section states, "[h]earing - [u]sing an audiometer for measurement, testing each ear separately, there should be no loss greater than 30 decibels at 500, 1000, 2000, 3000 and 4000 Hz, no loss greater than 40 decibels at 3000 Hz, and no loss greater than 50 decibels at 4000 Hz. The use of a hearing aid is permitted. However, additional testing will be required to determine if the standards can be met." Third Circuit Contract, § C-8(e)(2) (emphasis added). While there is language permitting the use of hearing aids, Kryjer and Jones were medically disqualified because they could not meet the hearing standards without their use. We need not decide whether the provision allowing hearing aids means that they were allowed to take the test with their hearing aids or under what

circumstance a hearing aid may be used. Again, procedural due process does not protect against "incorrect or ill-advised personnel decisions." Collins, 503 U.S. at 125. To the extent that the USMS may have made an arbitrary decision on the merits, it is not a matter of procedural due process but, if anything, would be a matter of substantive due process.[4] Boyanowski v. Capital Area Intermediate Unit, 215 F.3d 396, 399 (3rd Cir. 2000); see also County of Sacramento v. Lewis, 523 U.S. 833, 845-46 (1998).

In sum, the federal defendants did not engage in any action which unreasonably interfered with or substantially impaired plaintiffs' property interest in their jobs with MVM. However, even assuming that they did so, the USMS afforded plaintiffs appropriate procedural due process. Accordingly, we will grant the motion of the federal defendants for summary judgment on plaintiffs' claims that said defendants deprived them of procedural due process. We will deny plaintiffs' motion for summary judgment on these claims.

V. Procedural Due Process Claims Against MVM, Inc.

We now turn to the procedural due process claims against MVM. Again, we will assume for present purposes that each of the plaintiffs had a protected property interest in their employment because they could only be discharged by MVM for just cause under the CBA. MVM argues that an analysis of whether it

4. We previously dismissed the plaintiffs' substantive due process claims. Wilson, 2004 WL 765103 at *8, 11.

deprived the plaintiffs of their employment without due process of law is irrelevant because it is not a state actor. Alternatively, MVM asserts that the plaintiffs did not pursue their available grievance procedures.

The procedural protections of the Fifth Amendment's due process clause only apply when actions "fairly attributable" to the federal government work a deprivation of a protected property or liberty interest. Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982); see also Brown v. Philip Morris, Inc., 250 F.3d 789, 799 (3d Cir. 2001). The Supreme Court has set forth a test for determining whether a private party may be described and held liable as a federal actor. Lugar, 457 U.S. at 937-42; see also Brown, 250 F.3d at 801. As summarized in Edmonson v. Leesville Concrete Co., Inc., courts must ask "first whether the claimed constitutional deprivation resulted from the exercising of a right or privilege having its source in [federal] authority ... and second, whether the private party charged with the deprivation could be described in all fairness as a [federal] actor." 500 U.S. 614, 620 (1991) (citing Lugar, 457 U.S. at 937-42); see also Brown, 250 F.3d at 801. However, even assuming without deciding that MVM "could be described in all fairness as a federal government actor," it cannot be held liable for violating plaintiffs' procedural due process rights.

When asserting a procedural due process claim, "a plaintiff must have taken advantage of the processes that are available to him or her." Alvin v. Suzuki, 227 F.3d 107, 116 (3d

Cir. 2000). In Alvin, the plaintiff, a tenured professor, brought a procedural due process claim against the university that employed him. The faculty handbook contained a two-step grievance procedure. The plaintiff only proceeded with the first step. Because of this, the court found insufficient evidence to support his procedural due process claim. Id. at 116-18.

Here, the plaintiffs' CBA provided for internal grievance procedures applicable to all employment terminations. CBA, Art. 10. It first outlined an "Informal Procedure." CBA, Art. 10, § B. If this effort was unsuccessful, the plaintiffs could proceed through up to three additional "Steps" and then on to arbitration, if necessary. CBA, Art. 10, §§ C and E. The plaintiffs never took advantage of these procedures. Plaintiff Jones never grieved his termination through MVM's internal procedures. Plaintiffs Wilson and Kryjer had grievances filed on their behalf by their union, but they did not pursue the procedure past Step 1.

"When access to procedure is absolutely blocked or there is evidence that the procedures are a sham, the plaintiff need not pursue them to state a due process claim." Alvin, 227 F.3d at 118. In their brief, Wilson and Kryjer argue that MVM prevented them from completing the additional steps within the grievance procedure because MVM neglected to follow through with its responsibility under the CBA at Step 1, which reads:

> The contract manager and a representative of the Union shall meet within seven (7) working days of the service of said grievance for the

> purpose of discussing and, if possible, settling said grievance. The Employer shall give to the Union its answer to the grievance and its reasons therefor within three (3) working days of the conclusion of such meeting.

CBA, Art. 10, § C, Step 1, ¶ 2. The plaintiffs maintain that due to the fault of MVM this meeting never took place and the union was never supplied with answers to Wilson's and Kryjer's grievances. For support, they simply cite to a letter to Kryjer dated May 21, 2002 from Gottrich, Senior Operations Coordinator of MVM. The letter states:

> I have received your letter dated May 18th, in which you express your view that you were unjustly terminated from the CSO Program due to a hearing loss. I noted that you want to appeal this termination, but regret to inform you that there is nothing that MVM, Inc., can do to help you in this regard. The US Marshals Service evaluated your medical fitness. The USMS determined that you did not meet its medical standards. The USMS made the decision to have you removed from the CSO Program.

Pls.' Mot. for Summ. J. Ex. N (emphasis added).

This letter addresses MVM's inability to assist Kryjer with his appeal of his medical disqualification by the USMS. It has nothing to do with MVM's termination of his employment. There is simply no evidence in the record that MVM prevented the plaintiffs from pursuing their grievances. What is established by the record is that Wilson and Kryjer initiated the Informal Step and Step 1. Meetings between Charles Fredericksdorf, President of the plaintiffs' union, and John Gillen, Site Manager of MVM, took place on May 2, 2002 and May 6, 2002. Gillen denied

Wilson's and Kryjer's grievances at the Informal Step on those dates. Pls.' Mot. for Summ. J. Ex. J and K. Wilson and Kryjer proceeded to Step 1. Neither of them contacted anyone to discuss the status of their grievances after Step 1 was initiated. Gillen testified at his deposition that his supervisor, Flip Lorenzoni, denied the plaintiffs' grievances at Step 1 and that the union never proceeded with the additional stages. Moreover, Wilson and Kryjer were entitled to arbitration with a disinterested and neutral arbitrator, but they did not take advantage of this opportunity. Accordingly, these plaintiffs cannot establish that their access to the procedures was absolutely blocked. Alvin, 227 F.3d at 118.

A plaintiff also need not pursue grievance procedures if the procedure is a sham or if plaintiffs' efforts would be futile. Id. at 118-19. The plaintiffs here have presented no such evidence.

For the reasons stated above, even assuming without deciding that MVM may be a federal actor, summary judgment must be granted in favor of MVM on the plaintiffs' procedural due process claims.

## VI. ADA Claims Against MVM, Inc.

The plaintiffs also bring claims alleging that MVM terminated their employment in violation of the ADA. 42 U.S.C. § 12101, et seq. To make out a claim of disability discrimination under this statute a plaintiff must first establish a prima facie case by showing that: "(1) he is a

disabled person within the meaning of the ADA; (2) he is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) he has suffered an otherwise adverse employment decision as a result of discrimination." Shaner v. Synthes, 204 F.3d 494, 500 (3d Cir. 2000) (citation omitted); see also McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). If the plaintiff succeeds in making this showing, the burden of production then shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Id. at 500-01. If the defendant meets this burden, the plaintiff must then prove, by a preponderance of the evidence, that the reasons offered by the defendant were not true but were a pretext for discrimination. Id.

Under the ADA, a plaintiff is disabled if he (1) has "a physical or mental impairment that substantially limits one or more of the major life activities of such individual, (2) has "a record of such impairment," or (3) is "regarded as having such an impairment." 42 U.S.C. § 12102(2) (emphasis added).

An impairment that can be corrected by medication or other measures does not "substantially limit" a major life activity. Sutton v. United Air Lines, Inc., 527 U.S. 471, 482-83 (1999). Plaintiffs Kryjer and Jones were both medically disqualified by the USMS on account of hearing impairments. They concede, however, that their hearing difficulties are not substantially limiting. Wilson was medically disqualified by the

USMS due to his cardiac condition and his diabetes. He likewise concedes that his cardiac condition is not substantially limiting. He argues, however, that even though his diabetes is corrected by medication, it qualifies as a disability under the first definition in the ADA. This argument is without merit in light of Sutton. None of the plaintiffs is disabled under the first definition in the ADA.

The plaintiffs also argue that they are disabled under the third definition in the ADA because MVM regarded them as having a substantially limiting impairment. See 42 U.S.C. § 12102(2)(C). "[A] person is 'regarded as' disabled within the meaning of the ADA if a covered entity mistakenly believes that the person's actual, nonlimiting impairment substantially limits one or more major life activities." Murphy v. United Parcel Service, Inc., 527 U.S. 516, 521-22 (1999) (citing Sutton, 527 U.S. at 489). The problem with plaintiffs' position is that there is no evidence that MVM or even the USMS regarded the plaintiffs as having substantially limiting impairments. The USMS simply found palintiffs not to be qualified as CSO's and nothing more. Furthermore, there is nothing in the record to demonstrate that MVM regarded the plaintiffs to be unqualified even as CSO's.

The plaintiffs argue that, by accepting the USMS's determination regarding their medical disqualification and by making no effort to contest these findings by the USMS, MVM "adopted the findings and contentions of the USMS, including any

and all statements set forth in the [Medical Review Forms] that disqualified the Plaintiffs as well as the correspondence directing their termination." This proposition is without any merit. In their own motion for summary judgment, the plaintiffs recognize that MVM is not permitted to continue to assign an individual as a CSO once the USMS makes a medical determination to disqualify that individual. Plaintiffs also acknowledge that MVM is bound by this determination of the USMS. Therefore, the plaintiffs are not disabled under the third definition in the ADA. See Murphy, 527 U.S. at 521-22.

There is no evidence in the record that the plaintiffs are disabled or regarded as disabled as defined under the ADA. We will therefore grant summary judgment in favor of the defendant, MVM, on the plaintiffs' ADA claims.

VII. ADEA Claims Against MVM, Inc.

The plaintiffs have also sued MVM on the ground that it discriminated against them on the basis of their age in violation the ADEA. 29 U.S.C. § 621, et seq. In their opposition to MVM's motion for summary judgment, the plaintiffs have agreed to the dismissal of these claims without prejudice. However, as MVM correctly points out, Rule 41 of the Federal Rules of Civil Procedure precludes the voluntary withdrawal of these claims by the plaintiffs at this late stage in this lawsuit. The rule provides that a plaintiff may seek the voluntary dismissal of an action without prejudice "by filing a notice of dismissal at any time before service by the adverse party of an answer or of a

motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action." MVM has filed a motion for summary judgment and no stipulation of dismissal has been filed. We will therefore decide this matter on summary judgment.

In order to make out a prima facie case of age discrimination under the ADEA, a plaintiff must show that he or she "(1) was a member of the protected class, i.e., was over 40, (2) was qualified for the position, (3) suffered an adverse employment decision, and (4) ultimately was replaced by a person sufficiently younger to permit an inference of age discrimination." Monaco v. American General Assur. Co., 359 F.3d 296, 300 (3d Cir. 2004); see also McDonnell Douglas, 411 U.S. 792.

The plaintiffs have not opposed on the merits MVM's motion for summary judgment with respect to their ADEA claims but only requested a voluntary dismissal of these claims without prejudice. However, even if we assume, without deciding, that they could establish a prima facie case, MVM is still entitled to summary judgment because it has presented a legitimate, nondiscriminatory reason for terminating the plaintiffs which they cannot rebut. See Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1108 (1997).

The record establishes without dispute that MVM would have continued to employ the plaintiffs as CSO's but for the USMS's determination that they were not medically qualified.

Plaintiffs also rely on evidence in the record that MVM terminated the plaintiffs because it only had CSO positions within this district. Since MVM has met its burden of production, the plaintiffs must now produce evidence to allow a fact finder to either: "(1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." Id. The plaintiffs have not done so.

In addition to asserting discrimination claims under the ADEA based upon disparate treatment, the plaintiffs also initially alleged discrimination grounded upon a disparate impact theory. After MVM filed a motion to dismiss, this court, by Order dated April 1, 2004, dismissed the ADEA claims to the extent they were grounded upon a disparate impact theory. We did so because we concluded that such a theory was not recognized under the ADEA. Wilson, 2004 WL 765103, at *11.

This position, which we and other courts held, turned out to be incorrect. The Supreme Court has recently handed down a contrary decision in Smith v. City of Jackson, 125 S. Ct. 1536 (2005). In Smith, police and public safety officers brought suit against the City of Jackson, Mississippi, in which they alleged that salary increases they received under a revised employee pay plan violated the ADEA because the increases were lower than those received by younger officers. The district court found that their disparate impact claim was not cognizable under the

ADEA and the Court of Appeals for the Fifth Circuit affirmed the grant of summary judgment in favor of the City of Jackson. While the Supreme Court read the ADEA to authorize recovery based upon a disparate impact theory, it held that the plaintiffs nonetheless had not established a valid disparate impact claim. The Court determined that the differential in salary increases was based upon the City's perceived need to raise the salaries of junior officers to make them competitive with comparable positions in the market. The defendants had thus proven a reasonable factor other than age for its pay plan, as permitted under the ADEA. Smith, 125 S. Ct. at 1545-46; see also 29 U.S.C. § 623(f)(1).

Plaintiffs have now filed a motion for relief from judgment which in effect seeks reconsideration in light of Smith. They request to proceed with disparate impact claims and want more time for discovery. We are not persuaded. As in Smith, plaintiffs cannot prevail on their disparate impact claims because MVM based its decision to terminate the plaintiffs upon reasonable factors other than age. See Smith, 125 S. Ct. at 1545-46; see also 29 U.S.C. § 623(f)(1). MVM discharged the plaintiffs because the USMS determined that they were not medically qualified for the CSO position and MVM had no other positions available. All of the necessary discovery has been taken.

Consequently, summary judgment will be granted in favor of the defendant, MVM, Inc., on the ADEA claims. The motion of the plaintiffs for relief from judgment will be denied.

VIII. Breach of Contract Claims Against MVM, Inc.

Lastly, plaintiffs Wilson and Kryjer bring claims against MVM for breach of contract and breach of the covenant of good faith and fair dealing.[5] They argue that MVM breached the CBA by (1) wrongfully terminating them without just cause and (2) failing to abide by and participate in the grievance procedures.

MVM first contends that plaintiffs' state law contract claims are preempted by § 301 of the Labor Management Relations Act, ("LMRA") 29 U.S.C. § 185. Livadas v. Bradshaw, 512 U.S. 107, 123 (1994). Section 301 of the LMRA provides in relevant part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a). Neither party disputes that the CBA is the type of labor contract contemplated by § 301.

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5. We are aware that in Pennsylvania the breach of such a covenant gives rise to a breach of contract action, not an independent action for a breach of a duty of good faith and fair dealing. See Somers v. Somers, 613 A.2d 1211, 1215 (Pa. 1992).

Section 301 preemption assures that federal law will be the basis for interpreting collective bargaining agreements, Livadas, 512 U.S. at 122-23, and results in a unified body of federal common law to address disputes arising out of labor contracts. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 209 (1985). Thus, "when resolution of a state law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim or dismissed as pre-empted by federal labor-contract law." Id. at 220.

The claims of Wilson and Kryjer for breach of contract depend upon their entitlement to rights provided by the CBA and upon MVM's breach of duties imposed by the CBA. See CoreStates Bank, Nat'l Ass'n v. Cutillo, 723 A.2d 1053, 1058 (Pa. Super. Ct. 1999). They assert that they could be terminated for just cause only and that they were entitled to certain grievance procedures with which they contend MVM did not comply. Additionally, they argue that MVM's conduct constituted a breach of the implied covenant of good faith and fair dealing. These contract claims are based squarely upon the CBA, and each right and obligation derives from and is defined by the CBA. Thus, any attempt to assess liability will require contractual interpretation. We therefore find that Wilson's and Kryjer's contract claims are preempted by § 301.

We will treat their claims as arising under § 301 and will apply federal labor law principles. Livadas, 512 U.S. at

122. Before an employee may seek judicial enforcement of a collective bargaining agreement, he must attempt to exhaust any exclusive grievance and arbitration remedies established within it. Delcostello v. Int'l Broth. of Teamsters, 462 U.S. 151, 163 (1983). However, this rule is inapplicable when the failure to exhaust is on account of either the union's breach of its duty of fair representation or the employer's repudiation of those procedures. Vaca v. Sipes, 386 U.S. 171, 185 (1965). In either of these situations, the employee may obtain judicial review of his breach of contract claim despite his failure to secure relief through the contractual remedial procedures. Id. at 185-86.

Neither Wilson nor Kryjer exhausted the grievance procedures outlined in the CBA. Nonetheless, they argue that this was the result of MVM's failure to process their grievances beyond Step 1. We have already determined that the evidence does not support such a contention. Because Wilson and Kryjer did not exhaust the grievance procedures outlined in the CBA, and because there is no evidence that MVM repudiated these procedures, they may not now seek judicial enforcement of the CBA.[6] See Vaca, 386 U.S. at 184-86.

Accordingly, summary judgment will be granted in favor of the defendant, MVM, on the contract claims of Wilson and Kryjer under § 301 of the LMRA.

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6. The plaintiffs do not aver that their union breached the duty of fair representation.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| JOHN WILSON, et al. | : | CIVIL ACTION |
| v. | : | |
| MVM, INC., et al. | : | NO. 03-4514 |

ORDER

AND NOW, this 24th day of May, 2005, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the motion of defendants United States Marshals Service, Judicial Conference of the United States, and United States Department of Justice for summary judgment is GRANTED;

(2) the motion of defendant MVM, Inc. for summary judgment is GRANTED;

(3) the motion of plaintiffs John Wilson, Frank Kryjer, and Donald Jones for summary judgment is DENIED;

(4) judgment is entered in favor of defendants MVM, Inc., United States Marshals Service, Judicial Conference of the United States, and United States Department of Justice and against plaintiffs John Wilson, Frank Kryjer, and Donald Jones; and

(5) the motion of the plaintiffs for relief from judgment is DENIED.

BY THE COURT:

/s/ Harvey Bartle III
J.